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No. 99-1257

In the Supreme Court of the United States

CAROL M. BROWNER, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., RESPONDENTS

On Writ of Certiorari to
The United States Court of Appeals
For the District of Columbia Circuit

REPLY BRIEF FOR RESPONDENTS MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONERS

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REPLY BRIEF FOR RESPONDENTS MASSACHUSETTS AND NEW JERSEY IN SUPPORT OF PETITIONERS

SUMMARY OF ARGUMENT

1. Respondents argue that if section 109 of the Clean Air Act were reinterpreted to permit the open-ended balancing of "all logically relevant factors," the constitutional defect they perceive in the statute would disappear. ATA Br. 11; *see also* APC Br. 34 (agency must consider "overall impact of its decision on society"). Respondents' constitutional argument thus amounts to this: section 109 of the Clean Air Act, as interpreted by the Environmental Protection Agency (EPA) for thirty years, effects an unconstitutional delegation of legislative power because it does not confer sufficient discretion on the agency. This is, to say the least, an unusual reworking of a constitutional doctrine designed to cabin rather than enlarge agency discretion.

Respondents' counterintuitive argument rests on a misinterpretation of this Court's decisions under the nondelegation doctrine and on a series of erroneous factual premises. In legal terms, respondents err by claiming that the Constitution requires cost-benefit balancing. In factual terms, respondents err by embracing untenable assumptions about the monolithism and determinacy of cost-benefit balancing. They also erroneously suggest that regulating in the face of scientific uncertainty creates problems of constitutional dimension.

2. On the statutory issue involved in this case, respondents improperly seek to enlarge the judgment they received below, without petitioning for certiorari. They ask this Court to vacate the revised NAAQS for ozone rather than, as the court of appeals did, leave them in place. Respondents argue, contrary to the court of appeals' ruling, that EPA was not authorized even to *revise* the ozone NAAQS in light of new scientific evidence of ozone's harmfulness. Because EPA was not permitted to revise the ozone standards, it follows that the

agency may not implement the revised standards. Respondents' legal premise is mistaken; the Clean Air Act not only permits, but requires, EPA to revise the NAAQS for all of the pollutants regulated under this program in light of changing scientific knowledge of the harmfulness of these pollutants. Once EPA's authority to revise the NAAQS is acknowledged, its authority to implement revised standards follows naturally from the language of the statute.

ARGUMENT

I. THE CLEAN AIR ACT DOES NOT DELEGATE LEGISLATIVE AUTHORITY TO THE EXECUTIVE IN VIOLATION OF THE CONSTITUTION

As we set forth in our opening brief in this case, the Clean Air Act is plainly constitutional under this Court's precedents. The Act places numerous significant constraints on EPA's discretion in setting the NAAQS: it prescribes the factors EPA may and may not consider; requires a margin of safety as an antidote to scientific uncertainty; limits the range of pollutants regulated by the NAAQS program; limits the life span of each NAAQS; and imposes large procedural constraints on EPA's decisionmaking, including an intensive process of scientific review. Congress has thus made the most basic and important decisions that arise in setting air quality standards. Not only that, it has done so through a close collaboration and dialogue with the executive regarding the many challenges that arise in setting NAAQS. Because EPA has always recognized these manifold constraints on its discretion, EPA's *interpretation* of the Act is constitutional as well. Mass. & NJ Br., No. 99-1257, at 7-19, 28-43. Respondents' arguments to the contrary are wholly unpersuasive. Thus the nondelegation doctrine should be used neither to invalidate the Clean Air Act and EPA's longstanding interpretation of it nor to justify interpreting the statute to require, contrary to its plain language, cost-benefit

balancing.

A. The Nondelegation Doctrine Does Not Require Cost-Benefit Balancing

Remarkably, respondents do not discuss the Clean Air Act itself in arguing that the statute is unconstitutional as construed by EPA for thirty years. The sections of respondents' briefs discussing the constitutional issue contain only the most glancing references to specific provisions of the Act. ATA Br. 7-25; APC Br. 22-35. Rather than tackling the language, purpose, history, and context of the statute, as this Court's precedents on delegation instruct, *see, e.g., American Power & Light Co. v. SEC*, 329 U.S. 90, 104-05 (1946), respondents argue that the Clean Air Act cannot be constitutional so long as it precludes EPA from balancing "all logically relevant factors," including costs, in setting the NAAQS. ATA Br. 11; APC Br. 34. This Court has never held that cost-benefit balancing is constitutionally required, and it should not do so now. Indeed, it would be most odd to mandate open-ended balancing by agencies in the name of the nondelegation doctrine.

Respondents ATA, *et al.*, premise their argument on a misreading of this Court's cases upholding rate-setting and price-fixing statutes.[1] ATA Br. 12-14. Respondents rely

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[1]For their part, Appalachian Power Co., *et al.*, argue in favor of a balancing requirement by asserting that EPA simply cannot explain its decisions setting the NAAQS in the absence of such balancing. APC Br. 22-35. These respondents are, understandably, equivocal about the constitutional status of their argument; they concede that their claim might actually find its home in the "arbitrary and capricious" standard of the Administrative Procedure Act (APA). APC Br. 23. Respondents Appalachian Power, *et al.*, have succeeded in completely conflating the delegation doctrine and review under the APA. Respondents ATA, *et al.*, also often fail to perceive the

particularly on this Court's decision in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), which upheld the Federal Power Commission's (FPC) authority to fix natural gas rates according to the "prudent investment" method of rate-making. Respondents argue that *Hope Natural Gas* stands for the proposition that the nondelegation doctrine requires "a weighing of competing interests." ATA Br. 16. Respondents are mistaken.

The statutes at issue in *Hope Natural Gas* and other cases cited by respondents explicitly focused the agencies' attention on the consideration of costs. *See, e.g., Hope Natural Gas*, 320 U.S. at 600-01 & n. 8. The Clean Air Act, in contrast, *precludes* the EPA from considering costs in setting the NAAQS. Mass. & NJ Br., No. 99-1426, at 15-37. The observation that setting rates for natural gas involved "a balancing of the investor and the consumer interests" (*Hope Natural Gas*, 320 U.S. at 603, quoted in ATA Br. 13), thus means little in this case, where the statute at issue does not call for such balancing. Moreover, *Hope Natural Gas* was not even a nondelegation case: the only constitutional question posed in that case was whether rates set according to the "prudent investment" method were confiscatory under the Fifth Amendment. 320 U.S. at 601. Respondents' attempt to create, based on *Hope Natural Gas* and

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distinction between the Constitution and the APA. ATA Br. 17 (citing APA cases as if they were constitutional cases), 18-21 (discussing details of rulemaking record). On respondents' legal theory, every garden-variety failure-to-explain case in administrative law would assume constitutional status. The Court should reject the call for such a radical expansion of constitutional doctrine.

Respondents Appalachian Power Co., *et al.*, also wrongly claim that judicial review is impossible absent a cost-benefit balancing framework. Bizarrely, they rely on a case in which EPA *lost* a judicial challenge to a NAAQS under the arbitrary-and-capricious standard in arguing that judicial review is impossible under EPA's longstanding interpretation of the Clean Air Act. APC Br. 30, citing *American Lung Assn. v. EPA*, 134 F.3d 388 (D.C. Cir. 1998).

like cases, a constitutional requirement that agencies consider "all logically relevant factors," ATA Br. 11, must fail.[2]

Ironically, under respondents' reworking of the nondelegation doctrine, Congress would find itself in more trouble, the more it attempted to constrain discretion by limiting the factors an agency may consider. On respondents' theory, for example, section 7 of the Endangered Species Act, 16 U.S.C. 1536, must effect an unconstitutional delegation of legislative power because it requires federal agencies to shape their actions according to their effect on the continued existence of protected species, without regard to cost. *TVA v. Hill*, 437 U.S. 153, 172-88 (1978). Similarly, if respondents are correct, then this Court *created* a constitutional problem when it interpreted the Occupational Safety and Health Act (OSHAct) to require the Occupational Safety and Health Administration (OSHA) to find a "significant risk" (without considering cost) before regulating workplace toxins. *Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 639-40 (1980); *see also American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 505 n. 25 (1981) (approving OSHA's health-based method for finding significant health hazard).[3]

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[2]Respondents' argument also runs counter to this Court's jurisprudence of statutory interpretation. This Court has made clear that agencies ought not ignore statutory limits on the factors they may consider in regulating. Thus, in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), for example, the Court invalidated a rule of the Federal Communications Commission, finding that the rule effectively ignored statutory limits on the circumstances under which the agency could require access to elements of the telecommunications network of a local exchange carrier. *Id.* at 388-89. Far from supporting respondents' position, as respondents suggest (ATA Br. 10, 17; APC Br. 25, 35), *Iowa Utilities Board* undermines their plea to have this Court ignore the Clean Air Act's limits on the factors EPA may consider in setting the NAAQS.

[3]Like the Clean Air Act, the OSHAct requires the consideration of

In sum, not only would a good deal of federal legislation be open to the courts' disapproval under respondents' view, but it would be open to such disapproval on the ground that it *confined* agency discretion through limitations on the factors agencies could consider. This topsy-turvy understanding of the nondelegation doctrine should be rejected.

B. Respondents' Failure to Specify the Kind of Cost-Benefit Test They Would Require Under the Clean Air Act Strips Their Test of Any Meaningful Content

There is another deep irony in respondents' position. While respondents castigate the Administrator for failing to provide what they regard as "a governing principle" for setting the NAAQS, ATA Br. 4, respondents themselves do not explain what type of cost-benefit balancing they perceive in the Clean Air Act. Balancing tests can come in a wide array of forms. The standards set under these different frameworks will vary considerably. Respondents' argument that a simple directive to EPA to "consider[] costs and other countervailing factors," ATA Br., No. 99-1426, at 50, will somehow provide determinate results is built upon the mistaken premise that cost-benefit balancing is a monolithic methodology.

Balancing tests in health and safety regulation cover a vast territory. They include quite traditional "command-and-control" regulation, mandating the use of particular technologies, *see* Clean Water Act, 33 U.S.C. 1314(b)(1)(B); regulation comparing the risks of not regulating with the risks of regulating, *see* Food, Drug, and Cosmetic Act, 21 U.S.C. 360c(a)(2), Food Quality Protection Act of 1996, 21 U.S.C.

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costs in determining exactly what requirements will be imposed on individual sources of risk. *Cotton Dust*, 452 U.S. at 508-09 (feasibility analysis required in setting workplace standards); Mass. & NJ Br., No. 99-1426, at 24-28 (discussing manifold ways in which costs and feasibility relevant to decisions implementing the NAAQS).

346a(b)(2)(B)(iii)(I)-(II); open-ended balancing of a wide range of factors, *see* Toxic Substances Control Act, 15 U.S.C. 2605(c)(1); and regulation based on formal cost-benefit analysis and consumer willingness to pay for reductions in health risks, *see* Safe Drinking Water Act Amendments of 1996, 42 U.S.C. 300g-1(b)(6)(A), (b)(3)(C)(iii).

Thus, where Congress has called for balancing in standard-setting, it has chosen from a wide array of options and has tailored the balancing to fit the specific circumstances at hand. Because the Clean Air Act does not provide for the consideration of costs in setting the NAAQS, *see* Mass. & NJ Br., No. 99-1426, respondents cannot tell this Court what sort of cost-benefit balancing should be required under the Act.

Congress's failure to identify a specific kind of cost-benefit balancing in section 109 of the Act bolsters the conclusion that Congress simply did not permit such balancing to occur in setting the NAAQS. Moreover, respondents' consequent inability, themselves, to identify the nature of the balancing they have in mind unravels their argument that their reinterpretation of the Act would limit EPA's discretion. Faced with respondents' suggested directive–to "consider all logically relevant factors" in setting the NAAQS, ATA Br. 11–EPA would be free to do anything from setting technology-based, command-and-control-style regulations, to balancing risk against risk, to ceasing regulation at the point where the people hurt by air pollution were unwilling to pay the amount it would cost to prevent the pollution that hurt them. Clearly, it is not a limit on agency *discretion* that respondents are after; it is merely a limit on *regulation* that they desire.[4]

C. Respondents Overstate the Determinacy of Cost-

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[4]Amicus General Electric now concedes that the cost-benefit balancing that it devoted a separate brief (in No. 99-1426) to defending would not fix the nondelegation problem as GE sees it. GE Am. Br. 30, n. 8.

Benefit Analysis

Although respondents shy away from explicitly identifying the kind of cost-benefit balancing they would require in setting the NAAQS, they occasionally hint that formal cost-benefit analysis is what they have in mind. For example, respondents ATA, *et al.*, cite with approval the D.C. Circuit's opinion in *International Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991) (*Lockout/Tagout I*), ATA Br. at 22, which suggested that OSHA could avoid the invalidation of the safety-related provisions of the OSHAct on nondelegation grounds by interpreting those provisions to allow cost-benefit analysis. 938 F.2d at 1316-21. While respondents imply that the kind of analysis the court contemplated was nothing more than Benjamin Franklin's "moral or prudential algebra" (ATA Br. 22), this quaint description vastly understates the contentiousness and complexity of the cost-benefit analysis the court had in mind.

Writing for the court in *Lockout/Tagout I*, Judge Williams explained what he meant by cost-benefit analysis: "Cost-benefit analysis requires identifying values for lost years of human life and for suffering and other losses from non-fatal injuries." 938 F.2d at 1320. What the court failed to appreciate is that the potential "range of values," *id.*, for human life and human suffering is vast, perhaps even infinite, even when these values are determined by considering individuals' willingness to bargain for risk-related benefits.[5] Sometimes, for example, people simply refuse to participate in markets for risks to human life; in one study, researchers found that the

[5]In a concurrence to his own panel opinion, Judge Williams further elaborated on the process of setting a "numerical value on human life," noting that "[p]reference-based techniques are a commonly used approach, but are subject to such pitfalls as wealth bias, age bias and inconsistency." *Lockout/Tagout* I, 938 F.2d at 1326 & n. 1 (citation omitted).

majority of parents asked how steep a price discount they would require to accept riskier household products responded that they would not buy the products at all.[6] Other researchers have found, in contrast, that some workers receive no extra wage for riskier work; such results imply that, in some cases, enhanced risk has *zero* value in the marketplace.[7] "Willingness to pay" values for human life thus might plausibly range from zero to priceless. The bare requirement of cost-benefit analysis thus arguably *enlarges* rather than constricts the range of permissible agency responses to matters of life and death. Indeed, respondents themselves showcase the vast degree of discretion afforded an agency under a cost-benefit standard. ATA Br. 23.

D. The Nondelegation Doctrine Does Not Mandate a Single Approach to Establishing a Margin of Safety, Nor Does it Prohibit Regulation in the Face of Scientific Uncertainty

In promulgating the NAAQS at issue here, the Administrator emphasized the different issues and challenges that arise in setting NAAQS for different air pollutants. Because the air pollutants regulated by the NAAQS program cause very different kinds of health effects, and because estimates of these health effects are surrounded by different kinds and degrees of scientific uncertainty, the Administrator concluded that she could not identify one single correct approach to setting the margin of safety for all criteria air pollutants. NAAQS for Particulate Matter, 62 Fed. Reg. 38,652, 38,883 (1997). In remarks that play a prominent role in

[6]*See* W. Kip Viscusi, Wesley A. Magat & Joel Huber, *An Investigation of the Rationality of Consumer Valuations of Multiple Health Risks*, 18 RAND J. Econ. 476, 477 (1987).

[7]*See* Julie Graham, Don M. Shakow & Christopher Cyr, *Risk Compensation–In Theory and Practice*, 25 Envt. 14, 19-20 (Feb. 1983).

respondents' briefing, the Administrator disclaimed an obligation and even a capacity to set margins of safety based on a "generalized paradigm" and instead acknowledged that setting margins of safety was "largely judgmental in nature" and "may not be amenable to quantification. . ." *Id.* The Administrator noted that it would be particularly inappropriate to adopt an approach to seting margins of safety that assumed that air pollutants cease to have an adverse effect on public health below a certainthreshold level, if in fact no such threshold level has been proven. *Id.*

Respondents cite these snippets from the record as evidence of the unconstitutionality of EPA's decisions under the nondelegation doctrine. ATA Br. 5, 11, 17; APC Br. 21, 27.[8]

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[8]Respondents Appalachian Power, *et al.*, also assertthat the scientific evidence before EPA showed that there was no reevant difference between alternative ozone levels. APC Br. 8-9, 26-27. In support of this contention, respondents quote the Clean Air Scientific Advisory Committee's (CASAC) "closure letter" on the ozone standard, which stated that "there is no 'bright line' which distinguishes any of the proposed standards (either the level of the number of exceed[a]nces) as being significantly more protective of public health." APC Br. 8. In a portion of the letter not cited by respondents, CASAC went on to observe that the differences among the alternative standards did appear "considerable" when viewed from the perspective of the *absolute number of excess hospital admissions due to ozone.* Dr. George T. Wolff, Chair, Clean Air Scientific Advisory Committee, Closure Letter to Hon. Carol M. Browner (Nov. 30, 1995), <www.epa.gov/science1/casac02.pdf>. Thus, CASAC concluded, the choice between the standards turned on a "policy judgment" as to whether the *percentage of total asthma admissions (due to any cause) represented by the admissions due to ozone,* or the *absolute number of hospital admissions due to ozone,* was the relevant regulatory determinant. *Id.* Contrary to respondents' assertons, CASAC did not suggest that there was no difference between the alternative ozone standards; rather, it observed that the perceived magnitude of the difference between the standards depended on one's view of the

This argument comes in three parts. First, respondents imply that EPA must specify a single method for determining margins of safety. ATA Br. 11. Second, respondents ATA, *et al.*, argue that the approach EPA chooses in setting margins of safety *must* include the identification of a safe threshold for the relevant pollutant. ATA Br. 19 (EPA may not regulate criteria air pollutants unless it "affirmatively determines a health effects threshold and sets the standard with that threshold as the starting point ... "); *see also id.* at 18. Finally, respondents argue that if EPA has not determined a safe threshold for an air pollutant, its regulation of that pollutant will of necessity be unprincipled. ATA Br. 18-19.

Each of these arguments misses the mark. First of all, this Court has never used the nondelegation doctrine as a lever for requiring an administrative agency to adopt a particular rulemaking formula or methodology. In rejecting such an approach in *Lichter v. United States,* 334 U.S. 742 (1948), this Court observed:

> It is not necessary the Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.

Id. at 785. In faulting EPA for failing to adopt one single approach to establishing margins of safety for very different air pollutants, respondents would require just the "specific formula" that this Court has held is not constitutionally required.

Second, ATA's claim that EPA must find a threshold for every criteria air pollutant in order to avoid constitutional invalidation amounts to an argument that EPA may not regulate in the face of scientific uncertainty. As the Department of Health, Education, and Welfare (HEW) recognized in the very first criteria documents that, at

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relevant public policies.

Congress's direction, formed the basis of the very first NAAQS, it is typically not possible to identify a single "safe" (or "threshold") level of air pollution. Mass. & NJ Br., No. 99-1257, at 14-18. Respondents' argument that EPA must identify a threshold for the criteria air pollutants would effectively shut down the NAAQS program because it would require from science an answer that science seldom can provide. Respondents would thus forbid Congress from delegating lawmaking authority to an agency where, as is frequently the case, the agency must exercise its policy judgment based on evidence that is scientifically uncertain. Nothing in this Court's nondelegation jurisprudence requires such a result. Indeed, this Court's delegation cases are pervaded with cautious recognition of the fact that too severe an approach to questions of delegation might stop the government in its tracks. *See, e.g., Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940).

Finally, respondents are mistaken in suggesting that any approach to setting margins of safety that does not include the establishment of a safe threshold for each pollutant will necessarily be unprincipled. ATA Br. 18-19. In the rulemaking proceedings at issue here, EPA's observation that particulate matter and ozone may be "nonthreshold" pollutants was nothing more than an admission that the agency had not proven the existence of a level at which these pollutants had no effects on human health. It was not a claim that the agency had shown that these pollutants *do* have effects on human health at every concentration level above zero. It was not a claim that the agency would regard all such effects on health, if detected, to be sufficiently "adverse" to warrant a regulatory response. *See* S. Rep. No. 1196, 91st Cong., 2d Sess. 10 (1970). Nor was it a claim that the agency would regard all such effects to be effects on *public* health within the meaning of the Clean Air Act. 42 U.S.C. 7409(b)(1). Thus, even where a safe level (a "threshold") for a pollutant has not been proven, EPA still may, nonarbitrarily, set the NAAQS for that pollutant

based on its judgment with respect to such factors as uncertainties surrounding the evidence of health effects, the adverse nature of the detectable effects, and the size of the population affected. And indeed that is exactly the process EPA has followed in thirty years of regulation under the NAAQS program. Nothing in this Court's jurisprudence of delegation forbids administrative agencies to make judgments involving science and policy. Indeed, that is the very essence of the modern administrative state.

II. EPA MAY ISSUE REVISED OZONE NAAQS, DESIGNATE AREAS AS NONATTAINMENT UNDER THE REVISED NAAQS, AND IMPLEMENT THE REVISED NAAQS

A. Respondents Improperly Seek to Enlarge the Judgment They Obtained Below by Asking This Court to Vacate the Revised Ozone NAAQS

The court of appeals held that EPA was permitted to revise the ozone NAAQS and required to designate areas as nonattainment under any revised NAAQS. U.S. Pet. App. 361. However, the court also held that the agency could implement the revised NAAQS only in conformity with the classifications, attainment dates, and control measures set forth in Subpart 2 of Part D of the Clean Air Act, 42 U.S.C. 7511-7511f. US Pet. App. 34a. The court decided not to vacate the revised standard because EPA had authority to issue it and because the standard was "unlikely to engender costly compliance activities" by virtue of the court's ruling limiting implementation. U.S. Pet. App. 57a.

Respondents Appalachian Power, *et al.*, and Ohio, *et al.*, now seek to enlarge the judgment they obtained in the court of appeals by asking this Court to vacate the revised ozone standard on the ground that EPA had no authority to revise the prior ozone standard. APC Br. 2, 50; Ohio Br. 10, 40; *cf.*

ATA Br. 39 (conditionally embracing Ohio's argument). Respondents Ohio *et al.* are mistaken in asserting that their request for vacatur of the ozone standard would lead this Court to "affirm the lower court judgment," Ohio Br. 12 n. 1, because, as noted, the lower court chose not to vacate the ozone standard. U.S. Pet. App. 57a.

"A cross-petition is required ... when the respondent seeks to alter the judgment below." *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994); *see also, e.g., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119, n. 14 (1985). This Court has refused to consider arguments that, if accepted, would require modification of the judgment below in the absence of a petition for certiorari raising such issues. *See Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560, n. 11 (1976). Having found that EPA was authorized to issue a revised ozone standard, the court of appeals deliberately chose *not* to vacate that standard. Respondents cannot now ask this Court to hold that EPA may not revise the ozone standard, and to vacate the revised standard, when they did not petition for certiorari on this point.[9]

B. The Clean Air Act Permits EPA to Revise the Ozone Standard that Existed in 1990

If this Court decides, despite the absence of a petition for certiorari on this issue, to reach the question whether the court of appeals was correct in holding that EPA had no authority

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[9]The cross-petitions in No. 99-1426, challenging EPA's longstanding interpretation of section 109 of the Clean Air Act, do not justify respondents' *independent* efforts to alter the judgment below on the basis of Subpart 2. If this Court were to uphold EPA's interpretation of section 109 of the Clean Air Act, then there would remain no properly presented argument that the Court should vacate EPA's revised NAAQS. Indeed, ATA *et al.*, stated that their cross-petition "would not change the *form of the judgment*." ATA Cross-Pet. 28.

even to revise the ozone standard, it should hold that EPA has such authority.

The Clean Air Act imposes on EPA an obligation periodically to review and to revise the air quality criteria and NAAQS. Section 109(d)(1) of the Act provides:

> Not later than December 31, 1980, and at five-year intervals thereafter, the Administrator *shall* complete a thorough review of the criteria published under section 7408 of this title and the national ambient air quality standards promulgated under this section and *shall make such revisions in such criteria and standards* and promulgate such new standards as may be appropriate in accordance with section 7408 of this title and subsection (b) of this section.

42 U.S.C. 7409(d)(1) (emphasis added). Under this section, EPA is clearly obligated to conduct a periodic review of the criteria and NAAQS, and to revise them if appropriate in light of the requirements of sections 108 and 109(b) of the Act.

Nothing in the statute erases EPA's obligation to review and revise the criteria and standards for all criteria pollutants, including ozone. The 1990 amendments, which added Subpart 2's specific requirements for implementing the ozone NAAQS that existed in 1990, did not alter section 109(d)(1) of the Act. Indeed, the 1990 amendments specifically contemplated that the NAAQS might be revised. Section 172(e) provides:

> If the Administrator relaxes a national primary ambient air quality standard after November 15, 1990, the Administrator shall, within 12 months after the relaxation, promulgate requirements applicable to all areas which have not attained that standard as of the date of such relaxation. Such requirements shall provide for controls which are not less stringent than the controls applicable to areas designated nonattainment before such relaxation.

42 U.S.C. 7502(e). By its terms, section 7502(e) applies to all of the primary NAAQS, including the ozone NAAQS. Despite the court of appeals' express reliance on section 172(e) in holding that EPA may revise the ozone standard, U.S. Pet.

App. 35a, respondents do not even *mention* section 172(e) in their briefs.[10]

Respondents' argument not only flouts the clear language of the Act, it also would produce unreasonable consequences. Not even respondents argue that subpart 2 silently eliminates EPA's obligation to review and revise the air quality *criteria* for the ozone NAAQS, nor could they, given that in order to effect the relaxation of standards contemplated by section 172(e), new criteria documents would be required. Thus, under respondents' view, EPA must update the criteria documents for ozone to reflect the latest scientific information on ozone's adverse effects on human health and welfare, but if that information shows that ozone is more harmful than EPA had previously believed it to be, it has no power to change the regulatory regime to reflect that new information. Requiring the enormous expenditure of time and resources that goes into developing criteria documents, all to no purpose if the documents showed greater health effects than had previously

[10]Instead, respondents Ohio, *et al.*, discuss a provision of a House bill that was not enacted. That provision set a schedule for developing control requirements for a revised ozone NAAQS. Ohio Br. 15, citing H.R. 2323, 101st Cong., Section 181(e) (1989), as introduced, reprinted in II 1990 Leg. Hist. at 4060. Respondents do not mention that the cited provision stated that requirements pertaining to any revised ozone NAAQS "shall provide for controls which are not less stringent than the controls applicable to areas classified under this subpart." *Id.* Nor do they note that the House bill included this identical provision with respect to the other two pollutants discussed in that bill, carbon monoxide (*id.* at 4079) and particulate matter (*id.* at 4090). These provisions were clearly the precursors to section 172(e) of the enacted statute. Respondents' selective citations to the unenacted House bill, and their complete neglect of the parallel provision of the enacted statute, convey a wholly misleading impression of Congress's actions.

been predicted, would make no sense.[11]

Moreover, respondents' argument that Subpart 2 silently codifies the ozone standard existing in 1990 ignores the fact that the classifications and attainment dates set forth in Subpart 2 apply only to the *primary* ozone standard, not to the secondary standard. 42 U.S.C. 7511(a)(1) (Table 1). Respondents make a weak attempt to suggest that the secondary standard should be covered by Subpart 2, too, because section 181(a)(1) refers to "ozone nonattainment areas" generally. This argument ignores section 181(a)(1)'s explicit and exclusive reference to "*primary* standard attainment dates." 42 U.S.C. 7511(a)(1). Section 181(a)(1) thus clearly does not codify the secondary ozone standard existing in 1990. It would be very awkward to conclude that Congress had left EPA free only to change the secondary, but not the primary, ozone NAAQS.

Respondents offer two textual arguments in support of their claim that EPA may not revise the ozone NAAQS that existed in 1990. First, they argue that revision of the ozone NAAQS is not "appropriate" within the meaning of section 109(d)(1) because such a standard cannot be implemented except within the confines of Subpart 2. APC Br. 49; ATA Br. 39. As the court of appeals held, however, this argument "pointedly ignores the text immediately following the word 'appropriate,' which specifies that appropriateness is to be determined 'in accordance with section 7408 ... and [section 7409(b)] ...'" U.S. Pet. App. 35a-36a. The court of appeals correctly concluded

[11]ATA, *et al.*, suggest that EPA could share its information with Congress. ATA Br. 39-40. But that is not the regime created by section 109(b) of the Act, which clearly requires *EPA* to act upon the information developed in the criteria documents. 42 U.S.C. 7409(b). In many other sections of the Act, Congress required EPA to report to it on various matters, which would then be handled by Congress itself (*see* 42 U.S.C. 7548, 7511f, 7491-92, 7612); section 109(b) does not establish such a reporting scheme.

that Subpart 2 could not render revision of the ozone NAAQS inappropriate where Subpart 2 was neither listed in section 109(d)(1) nor incorporated by reference through section 108 or 109(b). U.S. Pet. App. 36a. Here, too, respondents simply ignore statutory language that runs counter to their preferred interpretation of the statute.

Second, respondents argue that it would make no sense to have a NAAQS that could not be implemented. Because, they contend, Subpart 2 precludes the implementation of any revised ozone NAAQS, this must mean that EPA may not revise the ozone NAAQS in the first place. APC Br. 42-47; Ohio Br. 13-16; ATA Br. 39. We agree that it makes no sense to have a standard that cannot be implemented. But we draw the opposite inference from this premise: because the Clean Air Act clearly obligates EPA to review and revise the air quality criteria and standards where appropriate in light of changing scientific knowledge, 42 U.S.C. 7408, 7409, EPA must be able to implement the standards it has deemed requisite to protect the public health and welfare.

C. Subpart 2 of the Clean Air Act Does Not Constrain EPA's Authority to Implement the Revised Ozone NAAQS

In our opening brief in this case, we canvassed the reasons for concluding, based on the language, history, and purpose of the statutory provisions, that Subpart 2 does not prevent EPA from implementing the revised ozone standard. Mass. & NJ Br., No. 99-1257, at 43-50. Respondents Ohio, *et al.*, and Appalachian Power, *et al.*, effectively concede that the court of appeals' ruling that EPA may revise the ozone standard, but may not implement the revised standard, makes no sense. Ohio Br. 24. The implication they draw from this insight–that EPA may not even revise the standard–is, as we have explained, inconsistent with the text of the statute itself.

For its part, ATA continues to argue that EPA may issue but

not implement a revised ozone standard. ATA Br. 39. It rests this argument on an untenable claim: contrary to the court of appeals' decision, ATA argues that EPA may not designate areas as nonattainment under a revised ozone standard. ATA Br. 39. ATA must recognize that its argument that the revised ozone standard may be implemented only in conformity with Subpart 2 would make no sense if EPA were under an obligation to designate areas as nonattainment under the revised ozone NAAQS. Section 181(a)(1) makes the classifications it specifies turn on the "interpretation methodology" of the *prior* ozone standard. 42 U.S.C. 7511(a)(1). Thus it is not possible to classify nonattainment areas under the *revised* ozone standard under section 181(a)(1). Mass. & NJ Br., No. 99-1257, at 46-48. Implicitly acknowledging that it would be absurd to require EPA to designate areas and then to ignore those same designations in promulgating classifications, respondents argue that EPA may not even designate areas as nonattainment under the revised ozone standard. ATA Br. 39. This argument flies in the face of the statutory language.

In 1990, at the same time as it was refining the requirements for implementing the then-existing NAAQS, Congress amended section 107(d)(1) of the Act to read as follows:

> By such date as the Administrator may reasonably require, but not later than 1 year after promulgation of a new *or revised* national ambient air quality standard *for any pollutant* under section 7409 of this title, the Governor of each State shall ... submit to the Administrator a list of all areas (or portions therefore) in the State, designating [areas] as ... nonattainment, ... attainment, ... or unclassifiable ...

42 U.S.C. 7407(d)(1)(A) (emphasis added). Section 107(d)(1) goes on to require the Administrator to

> promulgate the designations of *all areas* ... submitted under subparagraph (A) as expeditiously as practicable, but in no case later than 2 years from the date of promulgation of the new or revised national ambient air quality standard.

42 U.S.C. 7407(d)(1)(B)(i) (emphasis added).

Once again, these provisions do not carve out any exception for the ozone standard; they apply equally to all revised NAAQS. Indeed, in legislation specifically aimed at EPA's revised ozone standard, Congress extended the states' deadline for designations to two years and shortened EPA's deadline to one year. *See* Transportation Equity Act for the 21st Century, Pub. L. 105-178, §6103, 112 Stat. 107, 465. This statute reinforces the conclusion that EPA may (indeed, must) designate areas under the revised ozone standard.

Implicitly recognizing that EPA is under an obligation to promulgate *some* designation pursuant to section 107(d)(1), respondents recommend that EPA designate all areas as "unclassifiable." ATA Br. 39. But such a designation is permissible only where it is not possible "on the basis of available information" to say whether an area "meet[s] or [does] not meet[] the national primary or secondary ambient air quality standard for the pollutant." 42 U.S.C. 7407(d)(1)(A)(iii). No one argues that it is not possible to say whether an area's air quality meets the revised NAAQS for ozone, and thus respondents' suggestion is misguided. Perhaps recognizing the weakness of their claim, respondents ATA, *et al.*, quickly fall back on the argument embraced by the other respondents: EPA may not revise the ozone standard. ATA Br. at 39. For the reasons stated in the preceding section, this argument is mistaken.

CONCLUSION

This Court should reverse the court of appeals' ruling that the Clean Air Act and EPA's longstanding interpretation of it violate the nondelegation doctrine. The Court should affirm the lower court's ruling that EPA may revise the NAAQS for ozone and designate nonattainment areas under that NAAQS, but it should reverse the court's decision that EPA may not implement the revised standard outside Subpart 2 of the Act.

Respectfully submitted.

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